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October 2001

The Dangers of Disrepair

ROGER BERNHARDT

(Note: Fearing that I was overstating the case, I forwarded this article to my colleague Myron Moskowitz, who won all of the major landlord-tenant battles of the recent past, hoping that I would provoke a reply. I succeeded, and his thoughtful response appears after this column.)

The decision in *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442, is not one that should make attorneys rethink what they do. Although the reasoning is often astonishing, the result is quite normal, and one that attorneys probably could have warned their clients to expect.

By result, I mean the fact that a residential landlord was held liable for property damage resulting from a defective electrical system, and also for attorney fees, even though the tenants had not paid rent for the past year. In fact, I think we might see the same outcome in leased commercial premises, except possibly for the attorney fees. But the logic employed in *Fairchild* is so problematic that it is difficult for me to believe that any other court will ever follow it. If the reasoning is taken seriously, then we may have a lot of rethinking to do.

Liability in Tort or Contract?

On the first point—that a residential landlord is liable to his tenants for property damage they suffered due to a fire resulting from a defective electrical system—the outcome is no surprise. If the wiring “was in a state of proven disrepair,” it surely violated local building codes, thus generating standard tort liability for violation of a safety statute. The duties created by our building codes are imposed on the owners of the buildings, which makes landlords rather than tenants the ones to whom city officials look for compliance, and also makes them responsible in damages to persons injured because of the code violations. See, e.g., *McNally v Ward* (1961) 192 CA2d 871, 14 CR 260. For safety statute liability, commercial tenants are probably as much a protected class as residential tenants are.

The court’s logic regarding that liability is what caused the trouble in this case. Although the tenants sued for negligence and breach of the implied warranty of habitability, the trial court “barred all tort relief” on the habitability claim, and instead awarded \$89,000 in property damage for breach of the “implied warranty of quiet use and enjoyment.”

It is hard to see what the trial court accomplished by rejecting tort relief for breach of one warranty and then awarding the same relief for breach of another one that, as the appellate court acknowledged, really doesn’t exist. It is an open question whether tort liability should follow breach of the habitability warranty. Courts in other jurisdictions have declined to assert that it does, opining that negligence is a better mechanism for deciding such cases. See, e.g., *Favreau v Miller* (Vt 1991) 591 A2d 68. But given that California defines warranty of habitability in terms of compliance with building codes and that we treat a building code violation as a species of per se negligence, there is no need to come up with a second warranty theory, which would be subject to the same analysis as the first warranty theory. And I would not bet that California courts will refuse to award tort damages for breach of the implied warranty of habitability, given our general liberality in this field. (After all, to be honest about it, the warranty of habitability is really a tort duty masquerading as a contract: It does not appear in the language of the lease and it cannot be waived, which makes it look pretty *noncontractual*.) Plaintiffs’ attorneys should not stop pleading traditional negligence and backup theories of implied warranty of habitability

when their clients are tenants who suffered personal injuries or property losses from code violations.

What Untenantability?

One advantage of negligence theory over implied warranty theory is that negligence probably only requires plaintiffs to show that the safety statute or building code was breached, whereas the warranty of habitability is not breached unless noncompliance with the code makes the premises untenantable. In the latter case, rent ought to be reduced. Code of Civil Procedure §1174.2(a)(4) provides that when the implied warranty of habitability is breached, the court “shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed.” Since the trial court here apparently awarded the landlord the *entire* rent that the tenants had not paid for the past year, what kind of breach occurred? I wonder, as the dissent did, just how one can say that the warranty was breached in light of the award of full back rent? Unless the electrical system went bad only on the very day the fire broke out (allowing no time to fix it), the full rent award seems inconsistent with recovery on a warranty theory.

This decision seems to ignore the requirement of tenantability, but that may become more significant in better-reasoned decisions. On the other hand, as long as a code violation underlies the damage, a pure tort theory may do just as well, as far as the consequential damages are concerned.

Attorney Fees

One virtue of a contract theory of liability over one sounding in tort is that, under the right circumstances, success will get you not only recovery for the loss, but also an award of attorney fees. In this case, we are not told how much the attorney fees were, but the property damage award was only \$89,000 and I imagine the attorney fees were or will be more than that.

For attorney fees to be awarded, the lease generally must contain an attorney fees clause. In this case there was one, and it covered “breach of any of the covenants contained in this lease,” which I guess includes the implied warranties as well. Any doubt about the propriety of such fees is probably eliminated by the language of CCP §1174.2(a)(5), which makes successful assertion of a warranty-of-habitability defense a basis for awarding “costs and attorneys’ fees if provided by, and pursuant to, any statute or the contract of the parties,” although that section may be limited to unlawful detainer proceedings (which this was not). Conversely, when the theory of recovery is negligence, the attorney fees clause will be unavailing.

So, *if* there is tort liability for breaching the implied warranty of habitability, attorney fees are clearly properly awarded.

The Unpaid Back Rent

The tenants had not paid their rent for over a year, and although they recovered more in property damages than they owed in back rent, their arrearages caused them trouble under the doctrine that plaintiffs in a breach of contract action must plead either their own performance or an excuse for nonperformance. The dissent believed that this condition disqualified the tenants from receiving attorney fees, but the majority (and trial court) elected to make a completely novel end run around that principle—an argument that I think most landlord-tenant lawyers will not want to take seriously.

The majority argument was that, even though the tenants had breached their covenant to pay rent, they could still recover on their habitability claim because “the implied covenant of habitability contained in the lease is *independent* of the covenant to pay rent” (my italics). Now that statement is rather staggering: The revolution in residential landlord-tenant law over the past

50 years has been aimed at getting rid of the old common law doctrine of independent covenants and making the covenants dependent instead. The whole basis for the rule that tenants may withhold rent for unrepaired premises is that the duty to pay rent is dependent on, not independent of, the landlord's duties of repair. In *Green v Superior Court* (1974) 10 C3d 616, 635, 111 CR 704, which created the implied warranty of habitability in California, the supreme court said, "we now conclude that the tenant's duty to pay rent is 'mutually dependent' upon the landlord's fulfillment of his implied warranty of habitability." To declare that *Green* makes the residential rent covenant and the implied warranty of habitability independent of each other comes close to a willful misreading of that seminal case.

(Indeed, there is some misquoting in the opinion, which might well get the lawyer responsible in serious trouble. When I read in the opinion the quote from Miller & Starr stating that the rent and repair covenants are independent, I was in such doubt that I pulled out their book to confirm and found that their text added the sentence, "However, the covenant to pay rent and the landlord's warranty of habitability for residential premises are dependent covenants." Sadly, that completely contradictory assertion was not included in the court's published opinion. Either the court was attempting to bamboozle the public or one of the lawyers successfully bamboozled the court. Furthermore, this opinion quotes a very old decision, *Arnold v Krigbaum* (1915) 169 C 143, 146 P 423, for the proposition that lease covenants are independent, saying that *Green* overruled it "on another point," when it's pretty clear that *Green* directly overruled *Arnold* on the independence point, not some other issue.)

I would not advise any real estate lawyer to think that the old independent covenants doctrine retains any validity with regard to rent or repair covenants. Landlords who don't comply with their repair obligations to commercial tenants can expect to lose those tenants under the constructive eviction doctrine, which lets the commercial tenants quit because their duty to pay rent is dependent on the covenant of quiet enjoyment. Similarly, landlords who don't comply with their repair obligations to residential tenants can expect to see their rents withheld under *Green*, because the tenants' duty to pay rent is dependent on the implied warranty of habitability. The contrary reasoning of this opinion should be mercifully ignored.

Mutual Dependence?

Green said that the dependence between the two duties was mutual, but I don't believe it. Mutual dependence would mean that the landlord could stop maintaining the premises if the tenants fail to pay the rent. I think the dependence is unilateral: Tenants don't have to pay if landlords don't repair, but landlords have to repair anyway. The results are not symmetrical but they are livable: Landlords who are unhappy because they aren't receiving the rents they are owed can bring unlawful detainer to evict their tenants, which is both more effective and safer than ceasing repairs.

Unilateral dependence is probably the way it is in all residential landlord-tenant relations. Under our statutory repair-and-deduct statute, CC §1941, the landlord has to maintain the premises, and although that duty is dependent on the tenants' keeping up their own apartments, it is not dependent on their paying the rent. See CC §1941.2. It may be somewhat difficult to work out how tenants who are not paying rent can make repairs and then deduct their cost from the rents they didn't pay in the first place, but I am sure that a formula can be found. Similarly, nonrepairs can lead to reduction in allowable rents under a rent control ordinance. See *Sterling v Santa Monica* (1985) 168 CA3d 176, 214 CR 71. Thus, not repairing in response to not receiving rents may only reduce the rent to which the landlord is entitled thereafter.

Furthermore, shutting off the utilities because the rents have stopped may get a landlord in even worse trouble. Civil Code §789.3, which prohibits landlords from willfully terminating utility services, appears to cover terminations resulting from the landlord's failure to pay the

utility bill, but does not appear to excuse a landlord on the basis of not receiving rents. Bear in mind that the costs of violating that statute can include penalties that cumulate daily (see *Kinney v Vaccari* (1980) 27 C3d 348, 165 CR 787) as well as attorney fees (with or without an attorney fees clause in the lease).

In short, *Fairchild* may be all wrong in terms of what it says about the independence of rent and repair duties, but no residential landlord in California should think she can safely let her premises go unrepaired.